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No. 92-526

In the Supreme Court of the United States

OCTOBER TERM, 1992

ONE PARCEL OF REAL PROPERTY LOCATED AT 456 CAFFERTY ROAD, TINICUM TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court could rely in part on hearsay in determining that the government had shown probable cause to believe that petitioner properties were subject to forfeiture.

2. Whether the district court erred in holding that petitioner properties were traceable to illegal drug transactions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Bowen v. *Massachusetts*, 487 U.S. 879 (1988)	12
Brinegar v. *United States*, 338 U.S. 160 (1949)	10
Bush v. *United States*, 389 F.2d 485 (5th Cir. 1968)	9
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	12
Franks v. *Delaware*, 438 U.S. 154 (1978)	10, 12
Locke v. *United States*, 11 U.S. (7 Cranch) 339 (1813)	11,12
Nnadi v. *Richter*, No. 92-8225 (11th Cir. Nov. 4, 1992)	9
Ted's Motors, Inc. v. *United States*, 217 F.2d 777 (8th Cir. 1954)	9
United States v. *A Single Family Residence & Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d 625 (11th Cir. 1986)	8, 9
United States v. *$55,518.05 in U.S. Currency*, 728 F.2d 192 (3d Cir. 1984)	8
United States v. *1964 Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982), cert. denied, 461 U.S. 914 (1983)	9
United States v. *One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276 (9th Cir. 1983)	9, 10
United States v. *One Gray Samsonite Suitcase, Model 200*, 637 F. Supp. 1162 (E.D. Mich. 1986)	9
United States v. *One Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040 (5th Cir. 1979)	12

Cases—Continued: Page

United States v. *Parcel of Real Property Known as 6109 Grubb Rd.*, 886 F.2d 618 (3d Cir. 1989) 9
United States v. *Pole No. 3172*, 852 F.2d 636 (1st Cir. 1988) 14
United States v. *Premises & Real Property at 4492 South Livonia Road*, 889 F.2d 1258 (2d Cir. 1989) 8
United States v. *Premises Known as 526 Liscum Dr.*, 866 F.2d 213 (6th Cir. 1989) 9
United States v. *$250,000 in U.S. Currency*, 808 F.2d 895 (1st Cir. 1987) 9
United States v. *$2,500 in U.S. Currency*, 689 F.2d 10 (2d Cir. 1982), cert. denied, 465 U.S. 1099 (1984) 12
United States v. *2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106 (S.D. Fla. 1988) 9
United States v. *228 Acres of Land & Dwelling Located on Whites Hill Rd.*, 916 F.2d 808, cert. denied, 111 S. Ct. 972 (1991) 9
United States v. *Zolin*, 491 U.S. 554 (1989) 12
Wood v. *United States*, 41 U.S. (16 Pet.) 342 (1842) 10, 11

Statutes and rules:

19 U.S.C. 1497 9
19 U.S.C. 1615 ..... 8, 9, 11, 12
21 U.S.C. 881 ..... 8, 9, 11, 12
21 U.S.C. 881(a)(6) 2, 8
21 U.S.C. 881(d) 8, 11
22 U.S.C. 401 9
Fed. R. Civ. P. 52(a) 13
Fed. R. Evid.:
Rule 1101(b) 12
Rule 1101(e) 10, 11, 12

Miscellaneous: Page

1 D. Smith, *Prosecution and Defense of Forfeiture Cases* (1992) 12

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is unreported, but the judgment is noted at 970 F.2d 901 (Table). The opinion of the district court (Pet. App. C1-C30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1992. Pet. App. A1-A2. The petition for a writ of certiorari was filed on September 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 15, 1989, the United States filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking civil forfeiture of the premises located at 456 Cafferty Road in Bucks County, Pennsylvania, which consisted of a renovated farmhouse on 34 acres of land. The government later amended its complaint to add a forfeiture claim against a Keough account at the Bucks County Bank and Trust Company. The Cafferty Road property and the Keough account are petitioners here. Pet. App. C1-C2.

The government's complaint alleged that the real estate and the Keough account were proceeds traceable to a marijuana distribution operation and therefore subject to forfeiture under 21 U.S.C. 881(a)(6).[1] In response, petitioner Mark A. Wa[illegible]netz filed claims to the real estate and the Keo[illegible]gh account, and the

[1] 21 U.S.C. 881(a)(6) provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Bucks County Bank and Trust Company filed a claim to the Keough account. After the district court denied cross-motions for summary judgment, the government's complaint proceeded to a bench trial.

2. At trial, the government showed that petitioner Walynetz was a partner with Robert Broff in a marijuana distribution business from 1979 to 1984. Pet. App. C10-C11. The partnership initially received shipments of between 50 and 100 pounds of marijuana two to three times a month. Beginning in 1980, however, the partnership began receiving larger shipments. Specifically, in 1980, 1981, and 1982, petitioner Walynetz and Broff received two shipments of marijuana ranging from 700 to 1000 pounds each year. In 1983, they received a shipment of approximately 4000 to 6000 pounds of marijuana. And in 1984, they received a shipment of approximately 8000 pounds of marijuana. Their profits on these shipments averaged from $10 to $50 per pound, which they split evenly. *Id.* at C11. Over this period, petitioner Walynetz's income from the drug business was at least $87,000, and may have been as much as $590,000. *Id.* at C11-C12.

The Cafferty Road property was purchased by petitioner Walynetz, Broff, and Broff's wife for $117,000 in September 1980. At that time, Walynetz and Broff were operating their drug distribution business, and the operation provided Broff's sole source of income. Pet. App. C3-C4, C12, C22. The property was deeded in the name of Renew, Inc., a Pennsylvania corporation the only asset of which was the property. Initially, Walynetz owned 50% of the company's stock, and Broff and his wife owned the

other 50%. In late 1981 or early 1982, Walynetz purchased Broff's stock in the company for $50,000. *Id.* at C5. Subsequently, Walynetz made cash payments totaling more than $134,000 for renovations to the property. *Id.* at C6-C7. In addition, between 1981 and 1989, Walynetz deposited over $110,000 into the Keough account at issue. *Id.* at C9-C10.

During the trial, the government sought to introduce an affidavit from FBI Special Agent Albert Sproule that recounted conversations between petitioner Walynetz and Broff about an accountant who was skilled in falsifying income tax returns. Pet. App. B9. The district court requested supplemental briefing on the admissibility of the affidavit and reserved its ruling.

3. After trial, the district court issued a memorandum opinion finding the facts set forth above and holding that the real estate and the Keough account were forfeitable. Pet. App. C1-C27. One of the court's findings was based on the Sproule affidavit; the court relied on the affidavit to find that "Broff introduced Walynetz to Isaac Abrah[a]ms, his accountant. Broff told FBI Special Agent Albert Sproul[e] that Walynetz used Abrah[a]ms to create the appearance that Walynetz's funds had a legitimate source." *Id.* at C17.

Based on its findings, the court first held that the government had shown probable cause to believe that the Cafferty Road property and the Keough account were acquired with the proceeds of illegal drug transactions. In support of its holding with regard to Cafferty Road property, the court cited the fact that at the time the property was purchased, petitioner

Walynetz and Broff were involved in a drug distribution partnership, and the partnership provided Broff's sole source of income; that petitioner Walynetz was involved in the drug partnership at the time he paid for renovations to the property; and that he paid for the renovations largely in cash. Pet. App. C21-C23. With respect to its holding regarding the Keough account, the court cited the fact that Walynetz's deposits to the account from 1981 through 1984 were made while Walynetz was involved in the drug distribution operation; and that the total amount of deposits made to the account from 1981 through 1989 was less than the maximum amount of Walynetz's gross earnings from the drug business during that period. *Id.* at C23-C24.

The court further held that petitioner Walynetz had failed to rebut the government's showing of probable cause. Pet. App. C24-C26. With respect to the Cafferty Road property, the court determined that Walynetz had not shown that the property "was acquired and improved with an alternate[,] legitimate source of funds." *Id.* at C24. Specifically, Walynetz had "offered no reasonable explanation for his use of large sums of cash to pay the contractors who worked on the property," and he had "also failed to identify the source of his deposit, down payment and payments to Broff" for the property. *Ibid.* Similarly, the court determined that Walynetz had not shown that the Keough account was acquired with funds from a legitimate source. It was "not sufficient," the court said, "that Walynetz was involved in other business ventures during and after the time he was involved in drug trafficking or that he had income from [other]

sources." *Id.* at C25. In that connection, the court observed that the testimony by Walynetz's CPA regarding Walynetz's gross income for the relevant period was based on "unaudited tax returns" not shown to contain "true and accurate information." *Id.* at C25-C26. The court also noted that Walynetz did not produce any documents to support his claims of legitimate income. *Id.* at C26.

Finally, the court held that the Bucks County Bank and Trust had established that it was an "innocent and good faith lien holder" in the Cafferty Road property. Pet. App. C26. The court accordingly entered a judgment forfeiting the real estate to the United States, subject to the bank's lien, and forfeiting the Keough account *en toto*. *Id.* at C27-C30.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A2, B1-B12. It rejected petitioner Walynetz's claim that the government was required to trace the subject properties to specific illegal drug transactions. Rather, the court held, "under the drug forfeiture statute, the government [was] only required to show a reasonable ground for belief that there was an unlawful drug transaction and a substantial connection between the transaction and the property subject to forfeiture." *Id.* at B6. In this case, the court of appeals concluded, "the district court did not err by finding a substantial connection between [petitioner Walynetz's] [ill]icit drug activity and the house he purchased and the Keough account he funded." *Id.* at B7.

The court of appeals also rejected petitioner Walynetz's contention that he had rebutted the government's showing of probable cause by establish-

ing that the subject properties were acquired with legitimate income. The court noted that none of Walynetz's witnesses had "testified to specific amounts or dates of [legitimate] transactions, and none provided documentary support." Pet. App. B8. The court noted, in particular, that Walynetz's CPA "was merely asked to determine the amount of Walynetz['s] income during the seven-year period, not the source." *Id.* at B9.

Finally, the court of appeals rejected petitioner's contention that the district court abused its discretion by relying on hearsay in Agent Sproule's affidavit. Pet. App. B9-B11. The court of appeals initially determined that "[t]he government may establish probable cause for forfeiture by hearsay evidence." *Id.* at B10. It further determined that the Sproule affidavit "was admitted and used for the limited purpose of establishing the threshold question of probable cause"; the affidavit was not used in analyzing petitioner's rebuttal case. *Id.* at B11. Rather, the analysis of petitioner's rebuttal case "was based upon the lack of credible evidence offered by [petitioner] Walynetz['s] own witnesses." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner renews his contention (Pet. 26-40) that the district court erred by relying on hearsay in holding that the government had shown probable cause for the forfeiture. The court of appeals correctly rejected that contention. Pet. App. B9-B11.

The government brought its forfeiture complaint under 21 U.S.C. 881(a)(6). Pet. App. C1-C2. Section 881(a)(6) provides for the forfeiture of "all proceeds traceable to" an illegal drug transaction. See note 1, *supra*. Under Section 881(d), actions seeking forfeiture under Section 881 are governed by the "provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws." 21 U.S.C. 881(d). The procedures for forfeitures under the customs laws are, in turn, prescribed in 19 U.S.C. 1615. That provision, in pertinent part, states that in every case "the burden of proof shall be upon the defendant: *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court." 19 U.S.C. 1615.

In accordance with 19 U.S.C. 1615, the courts have held that in forfeiture actions under Section 881 the government must initially show probable cause for the forfeiture. The claimant then bears the burden of proving by a preponderance of the evidence that the subject property is not subject to forfeiture. That burden may be met by either rebutting the government's showing or establishing an affirmative defense (such as the "innocent owner" defense set forth in 21 U.S.C. 881(a)(6), see note 1, *supra*). See, *e.g.*, *United States* v. *Premises & Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1267 (2d Cir. 1989); *United States* v. *A Single Family Residence & Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d 625, 628-629 (11th Cir. 1986); *United States* v. *$55,518.05 in U.S. Currency*, 728 F.2d 192, 195-196 (3d Cir. 1984).

It is well established that, in showing probable cause for a forfeiture under 21 U.S.C. 881, the government may rely on evidence that would not be admissible in a criminal trial, including hearsay. All of the courts of appeals to address the issue have so held. See *Nnadi* v. *Richter*, No. 92-8225 (11th Cir. Nov. 4, 1992), slip op. 292-293; *United States* v. *228 Acres of Land & Dwelling Located on Whites Hill Rd.*, 916 F.2d 808, 814 (2d Cir. 1990), cert. denied, 111 S. Ct. 972 (1991); *United States* v. *Parcel of Real Property Known as 6109 Grubb Rd.*, 886 F.2d 618, 621 (3d Cir. 1989); *United States* v. *Premises Known as 526 Liscum Dr.*, 866 F.2d 213, 217 n.3 (6th Cir. 1989); *United States* v. *$250,000 in U.S. Currency*, 808 F.2d 895, 899 (1st Cir. 1987); *United States* v. *A Single Family Residence & Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d at 629; *United States* v. *1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 728 (5th Cir. 1982), cert. denied, 461 U.S. 914 (1983); *United States* v. *One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1283 (9th Cir. 1983) (*Tahuna*); *Ted's Motors, Inc.* v. *United States*, 217 F.2d 777, 780 (8th Cir. 1954).[2]

Those holdings reflect the longstanding principle that a determination of probable cause "depends not

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[2] The courts have reached the same conclusion in forfeiture proceedings under other statutes that, like Section 881, refer to 19 U.S.C. 1615. See, *e.g.*, *Bush* v. *United States*, 389 F.2d 485, 489 (5th Cir. 1968) (forfeiture proceeding under 22 U.S.C. 401); *United States* v. *2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1113 (S.D. Fla. 1988) (forfeiture proceeding under Endangered Species Act, 16 U.S.C. 1531-1543, and Lacey Act, 16 U.S.C. 3371-3378); *United States* v. *One Gray Samsonite Suitcase, Model 200*, 637 F. Supp. 1162, 1164-1165 (E.D. Mich. 1986) (forfeiture proceeding under 19 U.S.C. 1497).

upon the admissibility of the evidence upon which the government relies but only upon the legal sufficiency and reliability of the evidence." *Tahuna*, 702 F.2d at 1283. Thus, this Court stated in a forfeiture action that "probable cause" means a "reasonable ground of presumption, that the [forfeiture complaint] is, or may be, well founded." *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 366 (1842). The Court has never suggested that courts may consider only admissible evidence in determining probable cause. On the contrary, in addressing the showing of probable cause required for the issuance of a search warrant, the Court has stated that "probable cause may be founded upon hearsay and upon information received from informants." *Franks* v. *Delaware*, 438 U.S. 154, 165 (1978); see also *Brinegar* v. *United States*, 338 U.S. 160, 173 (1949) (there is a "large difference" between "what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search," and "therefore a like difference in the *quanta* and modes of proof required to establish them").

Petitioner Walynetz nonetheless argues (Pet. 33-40) that, in determining probable cause, the district court could not consider Agent Sproule's affidavit because it contained hearsay. Petitioner relies primarily on Rule 1101(e) of the Federal Rules of Evidence, but that provision does not support his argument.

Rule 1101(e) provides that the Federal Rules of Evidence govern "actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624)," but only "to the extent

that matters of evidence are not provided for" in that Act. Petitioner does not cite any case law for his assumption (Pet. 33-37) that, because Rule 1101(e) refers to certain proceedings under the Tariff Act, it also covers proceedings under 21 U.S.C. 881 by virtue of the reference in Section 881(d) to the "customs laws."[3] In any event, assuming arguendo that, under Rule 1101(e), the Rules of Evidence do apply to forfeiture proceedings under 21 U.S.C. 881, they do so only "to the extent that matters of evidence are not provided for in" the statutes governing those proceedings. Fed. R. Evid. 1101(e). The matter at issue here—*i.e.*, whether the government may make the required showing by hearsay evidence—*is* provided for in 19 U.S.C. 1615 by virtue of its use of the term "probable cause" to describe the required showing.

As this Court has said, "probable cause" has "a fixed and well-known meaning" in forfeiture actions. *Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 348 (1813). It means, as discussed above, a "reasonable ground of presumption, that the [forfeiture complaint] is, or may be, well founded," *Wood* v. *United States*, 41 U.S. (16 Pet.) at 366; see also *Locke*, 11 U.S. (7 Cranch) at 348, and it may be established by hearsay,

[3] That assumption, moreover, is hardly compelled by the language of Rule 1101(e). Rule 1101(e) refers to "actions for * * * forfeitures under part V of title IV of the Tariff Act," but it does not refer to actions for forfeitures under 21 U.S.C. 881. Proceedings under Section 881 are governed by the "customs laws" insofar as the customs laws are "applicable and not inconsistent with" Section 881. 21 U.S.C. 881(d). Yet such proceedings are not actions "under" the customs laws; rather, they are actions "under" Section 881.

see *Franks* v. *Delaware*, *supra*. In light of these well established principles, Congress's use of the term "probable cause" in the forfeiture statute indicates an intent to permit the use of hearsay to establish probable cause for forfeiture. See *Locke*, 11 U.S. (7 Cranch) at 348; see also, *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). For that reason, petitioner's reliance on Rule 1101(e) as barring the use of hearsay is misplaced.[4]

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[4] Petitioner's reliance (Pet. 33) on Fed. R. Evid. 1101(b) is likewise misplaced. Rule 1101(b) states that the Federal Rules of Evidence "apply generally to civil actions and proceedings." Petitioner argues that actions under 21 U.S.C. 881 are governed by those rules, including the rules governing admission of hearsay, because such actions are civil in nature. This analysis, however, does not go far enough. The hearsay rules address the manner in which a party meets a burden of proof at trial. In forfeiture actions under Section 881, the claimant bears the burden of proof pursuant to 19 U.S.C. 1615, and therefore may be bound by the hearsay rules. See, *e.g.*, *United States* v. *$2,500 in U.S. Currency*, 689 F.2d 10, 16 (2d Cir. 1982), cert. denied, 465 U.S. 1099 (1984); *United States* v. *One Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040, 1041 (5th Cir. 1979). In contrast, "section 1615 does not require the government to present a prima facie 'case' for forfeiture but rather a mere 'showing' that it has probable cause to believe the property subject to forfeiture." 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 11.03[5], at 11-18 (1992). The nature of the government's showing and the means by which the showing is judged—*i.e.*, it is "to be judged of by the court," 19 U.S.C. 1615—bear little resemblance to the circumstances for which the hearsay rules were intended. Given the well-settled principle that hearsay may be used to establish probable cause, Rule 1101(b) should not be interpreted to prohibit its use. Cf. *United States* v. *Zolin*, 491 U.S. 554, 565-568 (1989)

Finally, even if the district court erred in relying on hearsay to determine probable cause, that error was harmless and thus does not warrant further review. See Fed. R. Civ. P. 52(a). As the court of appeals recognized (Pet. App. B11), the district court used Agent Sproule's affidavit for a limited purpose. Specifically, the affidavit was the basis for the district court's finding that petitioner Walynetz and Broff had a conversation about an accountant who could falsify tax returns. *Id.* at C17. That finding was peripheral to the government's showing of probable cause. The government's showing centered on proof of the existence of the marijuana distribution partnership between petitioner Walynetz and Broff and the income it produced. See Pet. App. C3-C17. Because the evidence of drug trafficking was ample, and because the Sproule affidavit had little bearing on that evidence, petitioner cannot show that he was prejudiced by the district court's consideration of the affidavit.

2. Petitioner Walynetz next contends (Pet. 40-51) that the evidence was insufficient to establish probable cause to believe that the Cafferty Road property and the Keough account were forfeitable in their entirety. He asserts that those properties were actually traceable in part to income from legitimate sources. That fact-bound contention does not warrant further review. While some of petitioner's witnesses testified that he had legitimate sources of income during the relevant period, petitioner produced no

(declining to interpret Federal Rules of Evidence in a way that would lead to absurd results).

documentary support to substantiate that testimony, as the court of appeals observed (Pet. App. B8). Nor did petitioner even attempt to trace his purportedly legitimate income to the properties at issue. Moreover, as the district court found, petitioner was involved in drug trafficking both at the time he purchased the Cafferty Road property and during the period he paid for major renovations to that property. *Id.* at C21-C23. Similarly, the deposits to the Keough account from 1981 through 1984 were made while petitioner was involved in drug trafficking, and petitioner's maximum income from the drug trafficking exceeded the total deposits made to the account from 1981 through 1989. Under those circumstances, the district court acted well within its discretion when it determined that the properties were traceable to illegal drug transactions. Cf. *United States* v. *Pole No. 3172*, 852 F.2d 636, 640 (1st Cir. 1988) (proof of extensive drug-dealing could show probable cause for forfeiture of value of house reflected by mortgage payments both during and after period of drug involvement). Petitioner's disagreement with the district court's determination provides no basis for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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